DEPARTMENT OF STATE REVENUE

04940685.SLF

FIRST SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 94-0685 ST
Claim For Refund - Sales And Use Tax
For The Periods: 1990 Through 1993

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales & Use Tax — Equipment Lease

Authority: 45 IAC 2.2-4-27(d)(3)(A); Mason Metals v. Dept. of State Revenue, 590 N.E.2d 672 (Ind. Tax 1992); Sales Tax Division Information Bulletin #42.

Taxpayer protests the imposition of sales tax on equipment rentals to related companies.

II. Sales & Use Tax — Topsoil

Authority: Cowden and Sons Trucking v. Indiana Department of State Revenue, 575 N.E.2d 718 (Ind. Tax 1991).

Taxpayer protests the imposition of sales tax on the hauling of top soil.

III. Sales & Use Tax — Diesel Fuel

Taxpayer protests the imposition of sales/use tax on the purchase of diesel fuel.

IV. Tax Administration — Penalty

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is engaged in the business of renting heavy construction equipment needed in construction-related endeavors. Taxpayer employed trained and licensed heavy equipment operators. Taxpayer leased its equipment to ABC Co., XYZ Co., as well as several other companies. Taxpayer leased the services of its own operators along with the equipment. Taxpayer paid sales tax on every piece of equipment it purchased, as the end user of the equipment, and did not collect sales tax on the leasing payments. Taxpayer has always been owned (50/50) by Owners A and B. Owner A has always been the sole owner of ABC Co. and Owners A and B have always been at least partial owners of XYZ Co. Additional relevant facts will be provided below, as necessary.

I. Sales & Use Tax — Equipment Lease

DISCUSSION

Taxpayer leased its heavy equipment to both related and unrelated companies. Taxpayer's invoices indicated the leases were for "machine and operator" or "truck and driver." The auditor assessed sales tax on the leases because the charges for the equipment lease and operator were not separately stated. However, the auditor subtracted an average of $14.00/hour for operators' wages before determining sales tax due.

Taxpayer protests the conclusions of a prior Letter of Findings which distinguished equipment rentals to related companies as opposed to unrelated companies. The first Letter of Findings determined that "rentals" to unrelated companies were exempt from sales tax as they were found to not be rentals/leases but the provision of services. The first Letter of Findings went on to state the rentals to related companies were taxable as they were true leases, and given the common ownership of the companies, control was exercised by the lessee. Taxpayer protests this distinction, with reference to control, made between the related and unrelated companies.

Taxpayer points to 45 IAC 2.2-4-27(d)(3)(A), Mason Metals v. Dept. of State Revenue, 590 N.E.2d 672 (Ind. Tax 1992), and the Department's Sales Tax Division Information Bulletin #42. 45 IAC 2.2-4-27(d)(3)(A) makes subject to sales tax the rental or leasing of tangible personal property joined with an operator when control of the property is exercised by the lessee. Information Bulletin #42 states in part:

> The renting or leasing of tangible personal property, together with the services of an operator, shall be subject to sales tax when control of the property is exercised by the lessee.
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> "Control" is exercised by the lessee when:
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> (1) the lessee has exclusive use of the property; and
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> (2) the lessee has the right to direct the manner of the use of the property.

In Mason Metals, the court analyzed whether a lessee had control (when the lessor provided a tractor and driver to haul lessee's trailer) by considering six factors:

(1) The employment of the driver.

(2) The right to direct movement of the bus.

(3) Obligation to pay costs and repairs.

(4) Obligation to pay fuel costs.
(5) The responsibility of garaging the vehicle.
(6) Payment of insurance and license fees.

Taxpayer claims the six factors from Mason Metals are satisfied by its transactions with related companies as well as the unrelated companies by arguing it employed the operator, retained control of the equipment's movements, retained the obligation to pay for repairs and fuel, stored the equipment, and paid the insurance and licensing of the equipment.

Taxpayer argues the Department is adding a seventh factor by requiring the companies to be unrelated. The first Letter of Findings stated,

> In the cases where the taxpayer conducted business with these related companies, the lessor company and the lessee company [is] controlled by the same person, [Owner A]. Therefore, it cannot be said that the lessee lacked control and possession over the equipment.

Taxpayer argues this is not an accurate depiction of how it operated its rental business. Taxpayer claims that as there were minority shareholders/owners in the related companies great care was taken to operate at arms-length and maintain each companies' independence. Taxpayer supports its position by stating all companies, related or unrelated, were charged at the same rate. Taxpayer also states operators were provided in every equipment lease and claims the reasons for requiring its operator stay with the equipment (personnel safety, proper maintenance of equipment, etc.) were relevant whether it was a related or unrelated company. Taxpayer argues all equipment rental transactions should be treated comparably.

FINDING

Taxpayer's protest is sustained. Taxpayer has proven to the Department's satisfaction that the equipment rentals to related companies should be treated the same as rentals to unrelated companies and were not leases but the provision of services.

II. Sales & Use Tax — Topsoil

DISCUSSION

Taxpayer was assessed sales tax on transactions involving topsoil. Taxpayer claims the topsoil was acquired, free of charge, from construction sites. Taxpayer states it did not sell the topsoil but charged for the transportation service alone. The first Letter of Findings relied on Cowden and Sons Trucking v. Indiana Department of State Revenue, 575 N.E.2d 718 (Ind. Tax 1991) and found the topsoil to be sold in a retail unitary transaction where the services were not separately stated, and therefore, subject to sales tax. Taxpayer claims the hearing officer misapplied Cowden.

The Cowden court defined a retail unitary transaction as one "which includes all items of personal property and services which are furnished under a single order or agreement and for which a total *combined* charge or price is calculated." Emphasis in original. Id. p.720. In Cowden, the taxpayer did not separate the hauling charge from the cost of the stone that was being delivered. The court found the Cowden transactions were clearly unitary but questioned whether they were retail. The court ultimately held in Cowden that the transactions were not retail.

Taxpayer analogizes itself to the Cowden case. Taxpayer argues it is not in the business of selling topsoil, does not maintain an inventory and did not pay for the topsoil and charged only for the service of delivering the topsoil.

However, as evidenced by taxpayer's invoices, taxpayer charged for "loads" of topsoil and not necessarily for the cost or time spent transporting the topsoil. The Department finds that taxpayer was selling the topsoil and not charging for the transportation service.

FINDING

Taxpayer's protest is denied.

III. Sales & Use Tax — Diesel Fuel

DISCUSSION

The auditor assessed sales tax on diesel fuel because the sales tax was not separately stated on the invoice. In the first Letter of Findings, the Department denied the taxpayer's protest with regard to one diesel vendor (W 76 M Petroleum) as the taxpayer failed to present evidence that the sales tax was paid.

Taxpayer has now provided the Department with records of diesel purchases from 76. On all invoices it is stated that price includes tax.

FINDING

Taxpayer's protest is sustained.

IV. Tax Administration — Penalty

DISCUSSION

Taxpayer was assessed a ten percent negligence penalty for failure to pay sales/use tax on the above-referenced items.

FINDING

Taxpayer's protest is sustained. Given the findings in Issues I and III, the assessed penalties no longer apply. The taxpayer's protest regarding Issue II is also sustained as the taxpayer has shown a reasonable cause for failure to pay the tax.